Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model

Current equal protection law provides inadequate protection to quasi-suspect classes[1] alleging that the burdens of a facially neutral law fall on them with a disproportionate impact.[2] Under the present approach to analyzing disproportionate impact claims raised by either a suspect or a quasi-suspect class, an equal protection violation is established if the plaintiff shows not only that the disproportionate impact in fact occurred, but also that it was imposed with a discriminatory intent.[3] This approach will be referred to as disproportionate impact analysis. Although the Supreme Court has expressed a willingness to examine both direct and circumstantial evidence of discriminatory intent,[4] it has refused to rely on purely circumstantial evidence.[5]

The intent requirement and the standards for satisfying it have been developed in cases involving claims by suspect classes.[6] That

1. Quasi-suspect classes are those subject to an intermediate level of review under the equal protection clause. *See* pp. 915-16 *infra*.

2. Under the Court's present approach, if legislation actually employs a suspect or quasi-suspect classification, heightened judicial scrutiny is automatically triggered. Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 108-09. Because this Note focuses on the evidentiary obstacles to invoking this heightened scrutiny for facially neutral legislation, it does not address current law on legislation that is facially discriminatory.

3. Washington v. Davis, 426 U.S. 229, 244-46 (1976). In *Washington*, two black applicants to the District of Columbia police force alleged that a test of verbal skills disproportionately excluded blacks. They did not, however, allege that the test was utilized with a discriminatory purpose. *Id.* at 235. The Court held that their claim did not constitute a prima facie violation of the equal protection clause. *Id.* at 244-46. The same analysis was applied to a quasi-suspect class in Personnel Adm'r v. Feeney, 442 U.S. 256, 273-74, 279 n.24 (1978). *See* p. 913 & note 7 *infra* (discussing *Feeney*).

4. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977).

5. In Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979), and Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979), the Court rejected the argument that discriminatory intent could be inferred if a disproportionate impact was the natural and foreseeable consequence of a decision. 443 U.S. at 464-65; 443 U.S. at 536 n.9. Both cases addressed the segregative effect of a school board's practices. In certain specialized contexts, however, the Court has been willing to accept circumstantial evidence as establishing intent. Castaneda v. Partida, 430 U.S. 482 (1977) (permitting use of pure disproportionate impact test to establish equal protection violation in specialized context of Texas keyman jury system). The jury context may be unique because nondiscriminatory methods of random selection are readily available.

6. All of the major cases enunciating the fundamental principles of disproportionate impact analysis have addressed claims based on race. *See* Dayton Bd. of Educ. v. Brinkman,

analysis then has been applied unquestioningly by the Court to the allegations of a quasi-suspect class.[7] This Note argues that it is inappropriate automatically to extend to the claims of quasi-suspect classes concepts that were designed to address the claims of suspect classes. The Note proposes an alternative model for proving discriminatory intent that addresses the special needs of quasi-suspect classes.

To illustrate the problems facing quasi-suspect classes under the current paradigm, the Note also examines the claims of linguistic minorities to an equal protection right to bilingual education.[8] Be-

443 U.S. 526 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

7. Personnel Adm'r v. Feeney, 442 U.S. 256, 273-74, 279 n.24 (1979). The Court did not discuss why it required proof of intent in cases involving quasi-suspect classes, nor did it explain why it invoked a standard of proof similar to that used in cases involving suspect classes. The proof requirements established in Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977), were applied without discussion by the Court. 442 U.S. at 279 n.24.

8. Bilingual education refers to a broad spectrum of programs, ranging from assimilative, English-as-a-second-language (ESL) programs to pluralistic bilingual-bicultural programs. Foster, *Bilingual Education: An Educational and Legal Survey*, 5 J.L. & EDUC. 149, 154-57 (1976). The considerable variety of programs may account in part for the scholarly disagreement on the pedagogical effectiveness of bilingual education. At least one review of the existing research, however, has found that bilingual education improved, or did not impede, oral language development, reading and writing abilities, mathematics and social studies achievement, cognitive functioning, and self-image for non-English-speaking students. L. ZAPPERT & B. CRUZ, BILINGUAL EDUCATION: AN APPRAISAL OF EMPIRICAL RESEARCH 39 (1977) (ERIC No. ED 153-758). There is also empirical evidence that bilingual education improves school attendance. *Id.* Unfortunately, a number of methodological defects impair the credibility of the major nationwide study on the effects of bilingual education. INTERCULTURAL DEVELOPMENT RESEARCH ASSOCIATION, THE AIR EVALUATION OF THE IMPACT OF ESEA TITLE VII SPANISH/ENGLISH BILINGUAL EDUCATION PROGRAMS 2, 4, 5-6, 7-8, 9, 10-12, 14-16 (1977) (ERIC No. ED 151-435) (citing highly questionable subjective methods of determining language proficiency, subjective methods of selecting comparison groups and failure to identify such groups in all cases, failure to provide adequate interim period between pre-test and post-test measures, improper use of reading test, failure to control for differences in programs and amount of in-service training of teachers).

This Note does not attempt to debate the merits of the various bilingual education programs. It argues only that some minimal level of bilingual education is required by the equal protection clause. *See* note 69 *infra* (equality of opportunity requires only meaningful access). The precise nature of this program can be left to educators under the supervision of the courts. If, however, a program were found to be ineffective, *see, e.g.*, Kobrick, *A Model Act Providing for Transitional Bilingual Education Programs in Public Schools*, 9 HARV. J. LEGIS. 260, 265-67 (1972) (ESL programs largely ineffective in meeting needs of non-English-speaking children), it would certainly not satisfy the mandate of the equal protection clause. The nature of the minimum program of bilingual education needed to satisfy equal protection requirements may change over time as educators and legislators become more aware of the efficacy of various approaches. Because a number of recently enacted state statutes require periodic reports on the results of programs initiated under the legislation, more information about the effects of bilingual education programs will be available in the future. *See* CAL. EDUC. CODE § 52177 (West 1978 & Supp. 1981); IND. CODE ANN. § 20-10.1-5.5-7 (Burns Supp. 1981); MICH. COMP. LAWS ANN. § 380.1158 (Supp. 1980-1981); N.M. STAT. ANN. § 22-23-5 (Supp. 1980); R.I. GEN. LAWS § 16-54-16 (Supp. 1980); WIS. STAT. ANN. § 115.996 (West Supp. 1980-1981).

cause most linguistic minorities arguably qualify as quasi-suspect classes, the proposed model can be used to vindicate those claims.[9]

I. The Current Approach to Quasi-Suspect Classifications

The Supreme Court's decisions have left unclear the precise criteria that determine quasi-suspect status. This ambiguity has prevented lower courts from labeling all arguably deserving groups as quasi-suspect classes. Linguistic minorities, for example, are particularly worthy candidates for quasi-suspectness, yet they have not been ac-

9. Although provisions for bilingual education have been made by federal statute, Bilingual Education Act of 1978, §§ 701-751, 20 U.S.C. §§ 3221-3261 (Supp. III 1979), the constitutional status of such congressional enactments is uncertain. In Lau v. Nichols, 414 U.S. 563 (1974), the Court pointed solely to a disproportionate impact in ruling that a failure to provide bilingual instruction to non-English-speaking children violated Title VI. *Id.* at 566-68. The Court relied heavily on a guideline, promulgated by the Department of Health, Education and Welfare (HEW), that required school districts to take affirmative steps to rectify the language deficiencies of children of ethnic minorities when these deficiencies kept such children from effectively participating in the educational programs. *Id.* at 568-69.

In Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), however, the holding in *Lau* was called into question. Five members of the Court expressed the view that the criteria for establishing a violation of Title VI were the same as those for establishing a violation of the equal protection clause. *Id.* at 287. Justice Brennan, however, in an opinion joined by three other Justices, pointed out that this holding was at odds with the decision in *Lau*. *Id.* at 352.

Despite the Court's questioning of the *Lau* rationale, Congress passed section 204(f) of the Equal Education Opportunities Act of 1974, 20 U.S.C. § 1703(f) (1976). This Act provides that no state may deny an individual an equal educational opportunity because the individual failed to overcome language barriers that impede participation in instructional programs. Although the Supreme Court has not decided whether, under section 5 of the Fourteenth Amendment, the Act may constitutionally exceed the scope of the equal protection clause, several courts have endorsed the view that it may. United States v. Hinds County School Bd., 560 F.2d 619, 623-24 (5th Cir. 1977); Martin Luther King Junior Elementary School Children v. Michigan Bd. of Educ., 463 F. Supp. 1027, 1031-32 (E.D. Mich. 1978).

The need to establish an equal protection right to bilingual education has become especially pressing in light of recent indications that Congress may include an intent requirement under civil rights provisions that were previously held to require only proof of a disproportionate impact to establish a prima facie case, thereby making the scope of these statutes coextensive with that of the equal protection clause. N.Y. Times, April 19, 1981, § 1, at 1, col. 1. In addition, the Reagan administration recently decided to reject proposed regulations requiring bilingual instruction in school districts with more than twenty-five non-English-speaking students. N.Y. Times, Feb. 3, 1981, § A, at 1, col. 1. According to Secretary of Education T.H. Bell, the regulations were "harsh, inflexible, burdensome, unworkable, and incredibly costly." *Id.* Until the new administration can formulate its own rules, guidelines established in 1975 will be followed, *see* note 83 *infra*; however, the administration clearly indicated a desire to cut back on the resources devoted to such programs, N.Y. Times, Feb. 3, 1981, § B, at 10, cols. 2-3. *See also* Comment, *The Legal Status of Bilingual Education in America's Public Schools: Testing Ground for a Statutory and Constitutional Interpretation of Equal Protection*, 17 DUQ. L. REV. 473, 500-01 (1978-1979) (constitutional right to bilingual education would promote greater judicial certainty and would not be subject to legislative repeal).

corded this status. Their treatment will therefore be used to illustrate the failings of current equal protection law.

A. *The Criteria for Determining Quasi-Suspect Status*

Although race is the paradigmatic suspect classification, the equal protection clause is not limited by its terms to protecting only racial minorities.[10] The Court has extended suspect status to classifications based on national origin[11] and alienage[12] in addition to those based on race. These suspect classifications are subject to strict scrutiny: they are disallowed unless necessary to promote a compelling state interest.[13] In addition, the Court has extended quasi-suspect, rather than suspect, status to classifications based on gender[14] and illegitimacy.[15] A quasi-suspect classification is subject to an intermediate

10. J. ELY, DEMOCRACY AND DISTRUST 148-49 (1980); Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment,* 91 HARV. L. REV. 1, 22 (1977). *But cf.* R. BERGER, GOVERNMENT BY JUDICIARY 23 (1977) (original intent of Fourteenth Amendment framers was to constitutionalize specific protections for blacks of Civil Rights Act of 1866). Berger suggests that the distinction between "citizen" and "person" in section 1 of the Fourteenth Amendment was simply not carefully considered. *Id.* at 215. Whatever the original intent of the framers may have been, the Court has accepted the view that the word "person" in the Fourteenth Amendment should include groups other than blacks. *See, e.g.,* Levy v. Louisiana, 391 U.S. 68, 70 (1968) (illegitimates are "persons" under equal protection clause).

11. *E.g.,* Hernandez v. Texas, 347 U.S. 475, 478-80 (1954); *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1012-19 (1978).

12. *E.g.,* Graham v. Richardson, 403 U.S. 365, 371-72 (1971); *see* L. TRIBE, *supra* note 11, at 1052-56. Beginning in 1978, however, the Court retreated from applying strict scrutiny to claims by aliens and adopted a looser, rational relation test. *See* Ambach v. Norwick, 441 U.S. 68, 72-75 (1979) (discussing Court's gradual withdrawal from according aliens suspect status); Foley v. Connelie, 435 U.S. 291, 294-97 (1978) (inappropriate to apply strict scrutiny to legislative classifications based on alienage when matters are within state's constitutional prerogatives). Although the Court did not explain its new position or overrule its prior decisions, the change may represent a *sub rosa* acknowledgment that alienage is better addressed under federal preemption doctrine than under equal protection law. Perry, *Modern Equal Protection: A Conceptualization and Appraisal,* 79 COLUM. L. REV. 1023, 1060-65 (1979).

13. Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627 (1969); Korematsu v. United States, 323 U.S. 214, 216 (1944).

14. *See, e.g.,* Craig v. Boren, 429 U.S. 190, 197-99 (1976); Stanton v. Stanton, 421 U.S. 7, 13-14 (1975); Reed v. Reed, 404 U.S. 71, 76 (1971).

15. The Court's treatment of illegitimacy has been inconsistent. In Levy v. Louisiana, 391 U.S. 68 (1968), although the Court claimed to be using a rational relation test, *id.* at 71, it subjected a classification based on illegitimacy to a heavier burden of justification. *Id.; see* Perry, *supra* note 12, at 1056 n.165. In Labine v. Vincent, 401 U.S. 532 (1971), the Court seemed to retreat from this position by upholding a Louisiana law that denied unacknowledged illegitimates the right to inherit from a father who died intestate if other designated relatives survived him, even though it felt that this policy was neither a perfect nor a desirable solution and that more rational choices were available. *Id.* at 538-39; *see* Perry, *supra* note 12, at 1056 n.165. The decision in *Labine* was given little weight, however, in Trimble v. Gordon, 430 U.S. 762 (1977), when the Court invalidated a law permitting illegitimates to inherit through intestate succession only from mothers.

level of review: it may be employed only if substantially related to an important state interest.[16]

In determining whether to accord suspect or quasi-suspect status to a class, the Court must decide whether the classification is in some relevant sense sufficiently "like race" to merit special judicial protection.[17] The Court has left largely unanswered, however, the question of which criteria are relevant to that determination and how much weight they should be given.[18] The clearest rule that can be stated is that qualification for quasi-suspectness turns on whether a class shares at least some of the indicia of suspectness.[19] This con-

The Court noted that the mere invocation of a proper state purpose was insufficient, *id.* at 769, and that the statute must also be "carefully tuned to alternative considerations," *id.* at 772 (quoting Mathews v. Lucas, 427 U.S. 495, 513 (1976)). Finally, in Lalli v. Lalli, 439 U.S. 259 (1978), the Court upheld an illegitimacy classification, but specifically stated that a law using such a classification must be substantially related to permissible state interests. *Id.* at 265. Despite this inconsistent treatment, recent commentators have concluded that illegitimacy is a quasi-suspect classification. *See, e.g.*, L. TRIBE, *supra* note 11, at 1057; Karst, *supra* note 10, at 22-23.

16. Craig v. Boren, 429 U.S. 190, 197 (1976). An intermediate level of review may not, however, be the neat unitary concept suggested by the formula in the text. Professor Tribe has suggested five techniques for implementing an intermediate level of review. In contrast to strict scrutiny, the courts may (1) permit less substantial state interests, and (2) approve a less precise fit between the law's means and ends. In contrast to the rational relation test, the courts may (3) require a current articulation of the law's purpose, (4) limit the ability of the state to invoke objectives as an afterthought, and (5) require that the challenged legal scheme be altered to permit rebuttal in individual cases. L. TRIBE, *supra* note 11, at 1082-89. In addition, Justice Marshall has argued that the level of review in fact varies from case to case depending on the circumstances. Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting).

17. J. ELY, *supra* note 10, at 149.

18. *Id.* at 149-50 (courts and commentators have failed to elaborate theory of quasi-suspectness); *see* Perry, *supra* note 12, at 1050-67 (illustrating inconsistent extension of judicial protection to classifications other than race).

19. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 505-06 (1976) (past discrimination against illegitimates justified quasi-suspect status, but was not severe or pervasive enough to merit strict scrutiny); Frontiero v. Richardson, 411 U.S. 677, 684-86 (1973) (plurality opinion) (past discrimination against women is one factor justifying strict scrutiny); L. TRIBE, *supra* note 11, at 1012 (discreteness and insularity should be central criteria of suspectness and quasi-suspectness); Perry, *supra* note 12, at 1050-51 (moral irrelevance of trait should be main determinant of suspectness and quasi-suspectness).

The Court has not extended quasi-suspect status to classifications such as age or wealth. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-14 (1976) (age discrimination claim by policeman forced into retirement at age 50 subject to rational relation test); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28, 55 (1973) (wealth discrimination claim regarding school financing in Texas subject to rational relation test). The reluctance of the Court to label age and wealth as quasi-suspect may be due to the important ways in which they diverge from the paradigmatic suspect class of race. While age is an imminent, inescapable attribute, it is also one that everyone has experienced or can expect to experience. Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 YALE L.J. 27, 32-34 (1979). Under a model of judicial review predicated on a failure of the legislative process, *see* p. 917 *infra*, age discrimination does not present a strong case for heightened scrutiny because a common characteristic of legislative failure—a dichotomy between those enacting a law and those burdened by it

fusion concerning what constitutes a quasi-suspect class may explain the Court's consistent failure to label as quasi-suspect some groups arguably deserving of that status.[20]

The Court has relied on three characteristics in ruling a class suspect. First, the Court has examined whether the class has suffered a history of discrimination.[21] Although discrimination may occur in a wide variety of areas, discrimination in the areas of voting and access to the political process is of special importance because it may foster the conditions of discreteness and insularity that characterize politically excluded minorities.[22] According to this view, judicial intervention is justified primarily to rectify failures in the legislative process.[23]

Second, the Court has looked to see if the class has been stigmatized by governmental action.[24] A group is unjustly stigmatized when

—is not present. It is also not necessarily stigmatizing to be treated differently because of one's age. Schuck, *supra*, at 33-34.

With regard to wealth, most Americans feel that enough economic opportunity exists to give each person the chance to achieve a satisfactory level of material well-being. J. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 334 (1978). The Court may therefore be reluctant to attribute a person's failure to occupy a higher economic and social status to the state; this failure is more likely to be attributed to an individual's own past mistakes, missed opportunities, and bad luck. *Id.* In addition, if the free market mechanism is accepted as legitimate, wealth differentials seem inescapable. Cases raising an equal protection claim based on wealth should therefore be heard under a fundamental interests doctrine because they depend not on whether the class is labeled suspect or quasi-suspect, but on a general consensus that the commodity involved is so essential that a minimum amount must be provided. Perry, *supra* note 12, at 1077-83.

20. This failure is serious because it deprives these groups of special judicial protection under the equal protection clause. *See* pp. 922-23 *infra* (discussing right of quasi-suspect classes to heightened judicial review absent countervailing harms).

21. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (class based on wealth not suspect in part because not subject to history of purposeful unequal treatment).

22. *See id.* at 28 (class based on wealth not suspect in part because it was not relegated to position of political powerlessness); Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (aliens accorded suspect status because they were prime example of discrete and insular minority entitled to heightened judicial solicitude). *See generally* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (source of description of discrete and insular minorities).

23. J. ELY, *supra* note 10, at 155-57. Professor Ely contends that legislative failure is more likely to occur when the legislature allocates resources between a group perceived as similar to itself and a group perceived as different from itself (a we-they dichotomy) than when it chooses between two groups perceived as different from itself (a they-they dichotomy). Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 933-34 n.85 (1973). Because legislators often perceive themselves as belonging to groups different from discrete and insular minorities, the legislators often strike an inappropriate balance between the interests of such groups and the claims of groups with which the legislators identify more closely. J. ELY, *supra* note 10, at 158-60.

24. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 361, 373-76 (1978) (dictum) (plurality opinion) (any statute that stigmatizes is unconstitutional violation of equal protection). Several commentators have noted the central importance of stigma in de-

the state treats an individual either as a member of an inferior caste or as a nonparticipant in governmental processes.[25] Stigma not only damages individuals psychologically, but also affects the way in which they are treated by other members of society.[26] Under this view, stigma must be defined not only by the individual's subjective reactions, but also by societal attitudes toward individuals with a particular characteristic.[27]

Third, the Court has asked whether the classification is based on immutable characteristics.[28] The principal reason for extending legislative approval or disapproval is to influence individual choices and activities.[29] Immutable characteristics by definition cannot be altered by legislative disapproval; illicit motives are thus more likely to underlie legislative use of such characteristics. The importance of immutability as an indicium of suspectness should not, however, be overrated. First, some suspect classifications are not immutable.[30] Second, some immutable characteristics are accepted as legitimate classifications.[31] Proponents of immutability as the major criterion of suspectness have failed to explain how courts should distinguish between legitimate and illegitimate legislative classifications based on immutable characteristics.[32] Immutability therefore cannot serve as a touchstone of suspectness, even though it is not entirely irrelevant.[33]

The precise degree to which a class must possess these characteristics in order to be accorded quasi-suspect, rather than suspect, status remains unclear. It seems probable, however, that if a group shares all of them to some degree, it should qualify at least for protection

termining when to apply heightened judicial scrutiny. *See* Karst, *supra* note 10, at 23-24; Karst & Horowitz, *The* Bakke *Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 26 (1979); Perry, *supra* note 12, at 1050-51.

25. Karst, *supra* note 10, at 6.

26. *Id.* at 6-8.

27. *See id.* at 6 n.25 (stigma defined not by subjective reaction of individual but by attitudes of others). *But cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 n.34 (1978) (Powell, J.) (stigma reflects standardless subjective judgment with no clearly defined constitutional meaning).

28. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion) (sex should be suspect classification in part because it is immutable characteristic).

29. J. ELY, *supra* note 10, at 154-55; Perry, *supra* note 12, at 1065-66. Perry concedes, however, that some immutable characteristics are relevant legislative considerations. *Id.* at 1065 n.220 (blindness relevant to opportunity to drive car).

30. J. ELY, *supra* note 10, at 150 (alienage).

31. *Id.* (physical disability and intelligence).

32. *Id.* Professor Ely claims that commentators have simply stated that immutable characteristics constitute appropriate classifications when they are relevant to legitimate purposes. *Id.* Such an assertion leaves very little independent justification for immutability theory. *Id.*

33. *Id.* at 155.

as a quasi-suspect class.[34] An additional factor that may influence the Court's decision to label a class quasi-suspect is the presence of a significant overlap between the class in question and other classes considered suspect. Although such overlap has been cited to support heightened judicial scrutiny,[35] it is probably not a central determinant of quasi-suspect status. One group already labeled quasi-suspect does not overlap significantly with suspect classes,[36] and at least one claim based solely on such overlap has failed.[37]

B. *The Inadequacy of the Current Treatment of Linguistic Minorities*

Although linguistic minority groups probably do not qualify as suspect classes,[38] some share enough indicia of suspectness to constitute a quasi-suspect class. First, some linguistic minorities have suffered a history of discrimination.[39] Because much of this discrimination occurred in the area of voting, these linguistic minorities may con-

34. The Court has been reluctant to extend strict scrutiny to new areas. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 12 (1972). In keeping with this reluctance, it has been increasingly receptive to Justice Rehnquist's suggestion that suspect status be limited to classifications based on race and national origin. J. ELY, *supra* note 10, at 148-49; *see* Trimble v. Gordon, 430 U.S. 762, 780-81 (1977) (Rehnquist, J., dissenting). Because only an intermediate level of review is applied to the claims of quasi-suspect classes, the Court should not be as reluctant to extend this status to other groups.

The Supreme Court's recent decision in Schweiker v. Wilson, 101 S. Ct. 1074 (1981), does not undercut this conclusion. In *Schweiker,* the Court applied only a rational relation test to the claims of mentally ill patients aged twenty-one to sixty-four in institutions not receiving Medicaid funds who challenged legislation excluding them from eligibility for certain Supplemental Security Income benefits. It reserved the issue of whether the mentally ill should be treated as a quasi-suspect class because the statute "d[id] not isolate the mentally ill or subject them, as a discrete group, to special and subordinate treatment." *Id.* at 1081. By contrast, statutes that require English to be the sole language of instruction burden only the non-English-speaking. Only they are deprived of instruction in their native language, and only they suffer the attendant adverse consequences of this deprivation. *See* note 8 *supra;* note 78 *infra.*

35. Hobson v. Hansen, 269 F. Supp. 401, 513 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (close judicial scrutiny of tracking system that led to ability groupings segregated by race and socioeconomic status).

36. The class of women, though considered quasi-suspect, does not contain a higher proportion of suspect groups than does a random sample of the population.

37. Jefferson v. Hackney, 406 U.S. 535, 548-49 (1972) (although percentage of recipients of Aid to Families with Dependent Children (AFDC) who were Negroes and Mexican-Americans was higher than in other social welfare programs, provision of relatively lower benefits to AFDC recipients was not subject to strict scrutiny).

38. The Court's reluctance to expand the scope of strict scrutiny leaves it unlikely to accord suspect status to linguistic minorities. *See* note 34 *supra.*

39. *See* Leibowitz, *English Literacy: Legal Sanction for Discrimination,* 45 NOTRE DAME LAW. 7, 25-46 (1969) (past discrimination against linguistic minorities in voting, education, legal proceedings, and business regulation).

stitute precisely the type of discrete and insular minority that has traditionally been denied access to elective political processes for remedying their problems.[40] Second, there is considerable evidence that certain linguistic minorities have been stigmatized by official rejection of their native language and heritage.[41] For example, the failure to provide adequate bilingual education has created language barriers in the schools; these language problems promote a sense of inferiority among those less facile in the English language.[42] Third, although the inability to speak English is not absolutely immutable, linguistic minorities may never be able to achieve the degree of fluency of their English-speaking counterparts, especially if they are denied bilingual instruction.[43] Finally, linguistic minority groups may overlap significantly with certain national origin groups considered to be suspect classes.[44] The Spanish-speaking population of the Southwest provides an excellent illustration of a large linguistic minority that arguably satisfies these criteria.[45]

40. Voting Rights Act of 1965, § 203, 42 U.S.C. § 1973b(f)(1) (1976); *cf.* Note, *The Constitutional Right of Bilingual Children to an Equal Educational Opportunity*, 47 S. CAL. L. REV. 943, 984 (1974) (bilingual children do not have meaningful access to majoritarian political process because they usually belong to ethnic minority groups that have historically been denied positions in government and because children in general lack autonomous political power).

41. Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52, 55-56 (1974).

42. *Id.* at 56; *cf.* Ryan & Carranza, *Evaluative Reactions of Adolescents Toward Speakers of Standard English and Mexican American Accented English*, 31 J. PERSONALITY & SOC. PSYCH. 855, 859-60 (1975) (negative stereotyping of Spanish-accented English); Ryan, Carranza, & Moffie, *Reactions Toward Varying Degrees of Accentedness in the Speech of Spanish-English Bilinguals*, 20 LANGUAGE & SPEECH 267, 271 (1977) (negative stereotyping increases with degree of accentedness).

43. *See* S. ERVIN-TRIPP, LANGUAGE ACQUISITION AND COMMUNICATIVE CHOICE 95, 107 (1973) (young children are adaptable and sensitive language learners, while adults may not have readily available strategies for language acquisition).

44. *See* Grubb, *supra* note 41, at 84 (linguistic minorities share substantial overlap with Chinese-Americans, Japanese-Americans, Mexican-Americans, and Puerto Ricans).

Claims based on wealth are clearly distinguishable from claims based on language. Equalizing the ability of all persons to speak English is generally viewed as a necessary and desirable concomitant of promoting an equal educational opportunity. *See, e.g.*, Lau v. Nichols, 414 U.S. 563, 566 (1974); Serna v. Portales Mun. Schools, 499 F.2d 1147, 1152-54 (10th Cir. 1974); Bilingual Education Act of 1978, § 702, 20 U.S.C. § 3222(a) (Supp. III 1979). By contrast, equalizing the wealth of all individuals is generally viewed as antithetical to equality of economic opportunity. The significance of a disproportionate impact in the two contexts is therefore quite different. *See* note 19 *supra*.

45. A linguistic minority certainly would qualify as a quasi-suspect class if it met to some degree all of the mentioned criteria of suspectness. For example, evidence suggests that the Spanish-speaking people of the Southwest meet these criteria. They have suffered a history of discrimination. *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, MEXICAN AMERICAN EDUCATIONAL STUDY, REPORT III: THE EXCLUDED STUDENT 13-20 (1972) (discrimination against Spanish speakers in education) [hereinafter cited as REPORT III]; U.S. COMM'N ON CIVIL RIGHTS, MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST 66-74 (1970) (recounting discrimination against Spanish-speaking persons

II. Current Disproportionate Impact Analysis: Inadequate Protection for Quasi-Suspect Classes

Proof of discriminatory intent is a crucial element of a disproportionate impact claim. When evaluating such claims, the Court has required litigants from quasi-suspect classes to meet the same standards for proving intent that it applies to suits by suspect groups. This requirement obtains even though, if intent is found, only an intermediate level of review will be applied, rather than strict scrutiny. Extending these high standards of proof to the claims of quasi-suspect groups unnecessarily deprives these groups of needed judicial protection. For example, even if linguistic minorities were accorded quasi-suspect status, their claims to bilingual education would not receive adequate treatment under the Court's current approach.

A. *The Current Approach to Disproportionate Impact Analysis*

Under the current law, a showing of disproportionate impact alone is insufficient to establish a violation of equal protection; the plaintiff also must show that the relevant governmental body acted with discriminatory intent.[46] The Court has created stringent standards for proving intent when claims are brought by suspect classes, presumably to avoid extensive judicial interference with legislative and administrative actions.[47] Intent cannot be found on the basis of circumstantial evidence alone; some direct evidence of discriminatory intent must also be presented.[48]

in police contacts and court proceedings) [hereinafter cited as JUSTICE IN THE SOUTHWEST]. A considerable amount of this discrimination has occurred in the area of voting. *See, e.g.*, Castro v. State, 2 Cal. 3d 223, 229-31, 466 P.2d 244, 247-49, 85 Cal. Rptr. 20, 23-25 (1970). Spanish speakers have also suffered the stigma associated with official rejection of their native language by the public school system. U.S. COMM'N ON CIVIL RIGHTS, A BETTER CHANCE TO LEARN: BILINGUAL BICULTURAL EDUCATION 146-47 (1975) [hereinafter cited as BILINGUAL BICULTURAL EDUCATION]; REPORT III, *supra*, at 13-20. Although the inability to speak English is not immutable, Spanish speakers who are deprived of bilingual education may never become as fluent as native English speakers. *Cf.* T. CARTER, MEXICAN AMERICANS IN SCHOOLS: A HISTORY OF EDUCATIONAL NEGLECT 161 (1970) (adult Spanish speakers find correct English pronunciation more difficult than young children). Finally, the Spanish-speaking population overlaps significantly with national origin groups, such as Mexican-Americans, that are considered suspect. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475, 477-80 (1953).

46. Washington v. Davis, 426 U.S. 229, 242-45 (1976).

47. Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 68-69 (1977).

48. Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 536 n.9 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464-65 (1979). In Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), the Court enumerated sources of both direct and circumstantial evidence that could be used to show intent. *Id.* at 266-68. Four evidentiary sources in addition to the impact itself were described: (1) the historical back-

In *Personnel Administrator v. Feeney*,[49] the Court indicated that the standards for proving intent developed in cases involving suspect classes would also apply to claims by a quasi-suspect class.[50] In particular, the Court ruled that evidence that a disproportionate impact on a quasi-suspect class was the natural and foreseeable consequence of a given action is insufficient to establish a discriminatory purpose.[51] Instead, the plaintiffs were required to show that the legislature had acted "because of" rather than "in spite of" a foreseeable disproportionate impact.[52] Yet if this heavy burden had been met, the challenged act would have been subject only to an intermediate level of review.[53]

A group that qualifies for suspect or quasi-suspect status is presumptively entitled to special judicial protection under the equal protection clause. Absent serious countervailing harms, suspect and quasi-suspect classes should be accorded some form of heightened judicial review of their claims.[54] The use of high standards for proving

ground of the decision, especially if it revealed a series of purposefully discriminatory actions; (2) the specific sequence of events preceding the challenged decision; (3) departures from normal procedures or substantive criteria; and (4) the legislative or administrative history of the decision, especially contemporaneous statements by officials, minutes of meetings, reports, or testimony as to motivation. *Id.* at 267-68. The first three sources of evidence are circumstantial, and the fourth is direct evidence.

49. 442 U.S. 256 (1979).

50. *Id.* at 271-74. The plaintiffs in *Feeney* claimed that the legislature acted with discriminatory intent because veterans' preference legislation had a foreseeably severe disproportionate impact on women, a quasi-suspect class. *Id.* at 278.

51. *Id.* at 278-79. Nevertheless, such foreseeability is relevant evidence of discriminatory intent. Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 536 n.9 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464-65 (1979). On occasion, moreover, the Court has been willing to accept evidence of a disproportionate impact alone as conclusive proof of discriminatory intent when the impact is otherwise inexplicable, either because of the blatancy of the disparity, Gomillion v. Lightfoot, 364 U.S. 339, 341-42 (1960) (redrawing of city line led to 28-sided figure that disenfranchised nearly all black voters); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (permits refused to all Chinese applicants while granted to virtually all non-Chinese applicants), or because it occurs over a substantial period of time in the context of a selection procedure particularly susceptible to abuse, Castaneda v. Partida, 430 U.S. 482, 495-97 (1977) (accepting statistical evidence of disproportionate impact as establishing prima facie case in context of keyman jury system).

52. 442 U.S. at 279. The Court elaborated by explaining that for a statute to be overturned, the legislature must have sought to keep women in a predefined and stereotypical place. *Id.*

53. *See id.* at 273.

54. Brest, *supra* note 2, at 107-09. The rationale for requiring special judicial protection of these groups depends, of course, on what criteria are accepted as the crucial indicia of suspectness. *See* pp. 916-18 *supra*. Professor Ely, for example, would argue that such groups deserve heightened solicitude because they are likely to be losers in the political process. J. ELY, *supra* note 10, at 159-60. Professor Karst, on the other hand, would argue that special protection is necessary because such groups have been unjustly stigmatized by governmental action. Karst, *supra* note 10, at 6. Yet whatever the reason for requiring heightened scrutiny of legislation affecting these groups, the result is the

intent deprives suspect and quasi-suspect classes of access to heightened judicial review in a broad range of situations in which convincing direct evidence of intent is unavailable.[55] Because facially neutral legislation often serves as a pretext for discrimination,[56] many acts of legislative discrimination may never be subject to heightened judicial scrutiny.[57]

When addressing claims of suspect classes, the Court must employ high standards for proving intent to prevent three types of harm that accompany the excessive invocation of strict scrutiny. First, because strict scrutiny almost always leads to invalidation of the law under review,[58] its frequent use would be too disruptive.[59] Second, excessive judicial interference with legislative action might be perceived as unauthorized and countermajoritarian.[60] Third, a low standard of proof, when coupled with strict scrutiny, would foster greater consciousness of suspect classifications by requiring the legislature to act with greater cognizance of the impact of legislation on such classes.[61] For example, threatening to scrutinize legislation strictly if the state does not avoid racially disproportionate impacts would force it to act with race in mind and thus might promote racial consciousness.[62]

same: a heightened level of review is mandated unless significant countervailing harms prevent its use. If the courts could exercise their discretion to deny heightened review in the absence of significant countervailing harms, they would cease to function adequately, in Ely's view, as a check on the legislative process or, in Karst's view, as safeguards against the unjustifiable imposition of stigma.

55. Direct evidence is often nonexistent when officials, because of the routine nature of their practices, need not explain their actions. Note, *The Role of Circumstantial Evidence in Proving Discriminatory Intent: Developments Since* Washington v. Davis, 19 B.C. L. REV. 795, 799 (1978). Even available evidence may be unreliable when the alleged violations occur over an extended period of time or involve a large number of officials. *Id.*

56. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 551-53 (1977); *see, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (facially neutral redistricting legislation designed to disenfranchise blacks); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (facially neutral ordinance requiring permits to operate laundries in wooden buildings administered in discriminatory manner against Chinese); Ho Ah Kow v. Nunan, 12 F. Cas. 252, 255-56 (C.C.D. Cal. 1879) (No. 6,546) (facially neutral ordinance requiring every male prisoner to have hair clipped designed to discriminate against Chinese).

57. In many situations, direct evidence of intent is lacking not because there was no discriminatory purpose but because that purpose was obscured. *See* note 55 *supra* (circumstances in which direct evidence of intent is unavailable). Those burdened by intentionally discriminatory but facially neutral legislation are arguably no less deserving of protection than those burdened by legislation that is more overtly discriminatory.

58. Gunther, *supra* note 34, at 8 (strict scrutiny is " 'strict' in theory and fatal in fact").

59. Eisenberg, *supra* note 47, at 68-69.

60. Because a court is not as politically accountable as the legislature, it may be perceived as countermajoritarian. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962).

61. Schwemm, *From* Washington *to* Arlington Heights *and Beyond: Discriminatory Purposes in Equal Protection Litigation*, 1977 U. ILL. L.F. 961, 995.

62. *Id.*

These harms are less imminent when the claims of quasi-suspect classes arise because only an intermediate level of review, not strict scrutiny, is applied. Many more laws can withstand an intermediate level of review than can pass muster under strict scrutiny.[63] The frequent use of intermediate review thus would not lead to widespread invalidation of laws. Disruption of governmental processes would be avoided, and the judiciary would be less susceptible to charges of illegitimate countermajoritarianism.[64] Similarly, the relative ease with which legislators can tailor statutes to bear a fair and substantial relation to an important state interest—the relationship needed to survive intermediate review—makes it less likely than under strict scrutiny that consciousness of disfavored classifications would increase. Because these countervailing harms are less likely to occur when the claims are those of quasi-suspect classes rather than suspect classes, the Court would be justified in employing a lower standard for proving intent in the quasi-suspect context.[65]

The decision to evaluate allegations of discriminatory intent raised by quasi-suspect classes under the same proof requirements developed for claims of suspect classes reveals a marked insensitivity to the special needs of the former. The equal protection concept of intent is not uniform. In cases involving racial discrimination, "intent" generally refers to animus on the part of the relevant governmental body.[66] By contrast, in gender discrimination cases, which are addressed to the claims of a quasi-suspect class, the Court has premised its equal protection decisions on findings that the legislature acted on the basis of archaic stereotypes regarding the roles of men and women.[67] Under this approach, the focus is less on animus than on the invocation

63. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259, 275-76 (1978) (applying intermediate review to uphold law that allows illegitimate child to inherit from intestate father only if court had entered order declaring paternity); Califano v. Webster, 430 U.S. 313, 316-17 (1977) (upholding law that requires different computation of social security benefits for men and women under intermediate level of review).

64. A. BICKEL, *supra* note 60, at 92-93, 128 (excessive judicial intervention is incompatible with principles of democratic theory and therefore must be limited).

65. Professor Brest has argued that because of heavy institutional costs of rectifying disproportionate impacts, the state should be required to eliminate only those impacts attributable to past discrimination. Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 36 (1976). A model that retains an intent requirement meets this cost-benefit criterion. Professor Perry has gone further by arguing that the benefits of a pure disproportionate racial impact test coupled with an intermediate standard of review outweigh the costs. Perry, *supra* note 56, at 558-60. If Perry's view is supportable, then certainly one can assert that the benefits of a more modest approach that retains the intent requirement outweigh the costs.

66. *See, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568, 593 (1979).

67. Califano v. Goldfarb, 430 U.S. 199, 210-11 (1977); Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973) (plurality opinion).

of mistaken assumptions about the characteristics of a quasi-suspect class.[68] Because invidious discrimination based on outmoded stereotypes may manifest itself in subtler ways than discrimination based on animus, quasi-suspect classes may require more flexible standards for establishing a prima facie case in order to obtain review of their claims.[69]

68. *E.g.*, Craig v. Boren, 429 U.S. 190, 198-99 (1976). By contrast, the Court, in Personnel Adm'r v. Feeney, 442 U.S. 256 (1979), seemed to require something closer to animus in a gender discrimination case. The Court required the plaintiffs to show that the legislature acted "because of" rather than "in spite of" a disproportionate impact on women. *Id.* at 279. The legislature must have sought to keep women in "a stereotypic and predefined place," *id.*, instead of simply accepting the validity of such stereotypes unquestioningly. The Court, however, did not explicitly recognize this shift in the definition of intent. *See* Note, *Discriminatory Purpose and Disproportionate Impact: An Assessment After* Feeney, 79 COLUM. L. REV. 1376, 1397-99 (1979) (discriminatory purpose involves different forms of invidious discrimination; *Feeney*'s failure to recognize this creates unjustifiably constrictive limitation on equal protection clause).

In conjunction with this shift, the Court also required that the plaintiffs provide some direct evidence of intent. *Id.* at 278-79. In applying this standard of proof in gender discrimination cases, the Court failed to recognize that in most such cases, "instances of first-degree prejudice are obviously rare." J. ELY, *supra* note 10, at 164. When "habit, rather than analysis," Mathews v. Lucas, 427 U.S. 495, 520 (1976) (Stevens, J., dissenting), motivates state action that discriminates on the basis of sex, direct evidence of the type referred to in Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267-68 (1977), may be unavailable. Instead, the vice is likely to be unthinking, and hence undiscussed, reliance on outmoded assumptions about women.

69. It may seem inequitable, however, to allow quasi-suspect but not suspect classes to use lowered proof requirements. To avoid this inequity, suspect classes could be given the opportunity to establish a prima facie case by meeting a lower burden of proof; however, their claims would then be subject to only an intermediate level of review. If the suspect class could meet the Court's current requirements for proving intent, its claim would continue to be subjected to strict scrutiny. This approach could provide a useful supplement, especially as potential defendants become more sophisticated and use subtler forms of discrimination, even with regard to suspect classes.

Although the standards for proving intent should be lowered, some proof of intent will probably continue to be required. An intent requirement accords with equal protection doctrine's traditional philosophical underpinnings, whether the plaintiff class be suspect or quasi-suspect. The courts generally regard the state's equal protection obligation to entail providing equality of opportunity and not equality of result. *See* Brest, *supra* note 65, at 5-6, 49-50 (antidiscrimination principle embodies equal treatment norm). *See generally* J. POLE, *supra* note 19, at 257-75 (history of American commitment to equality of opportunity). Equality of treatment does not require that the state achieve distributive justice among various groups, but only that it refrain from invidiously discriminating against suspect or quasi-suspect groups. Brest, *supra* note 65, at 6, 48-49, 52; *cf.* Fiss, *Groups and the Equal Protection Clause*, 5 J. PHILOSOPHY & PUB. AFF. 107, 165-68 (1976) (equal protection clause may plausibly be construed to prohibit state action harming disadvantaged group, except when such action is necessary to promote compelling benefit to polity). If disproportionate impact alone were sufficient to establish an equal protection violation, the state would be required to investigate the effects of its legislation on various groups, even in the absence of an intention to discriminate invidiously. It would thus be required to pursue equality of result rather than equality of opportunity. This shift in focus might lead to excessive judicial interference in existing governmental practices and to accusations that the courts had usurped the role of the legislature. *See* p. 923 *supra* (excessive judicial action perceived as countermajoritarian). Requiring the state to avoid disproportionate impacts on suspect and quasi-suspect classes would also heighten its awareness of those classes. Schwemm, *supra* note 61, at 995.

B. *The Claims of Linguistic Minorities to Bilingual Education: An Illustration*

Even if linguistic minorities were to be accorded quasi-suspect status, the Court's current approach to disproportionate impact analysis would nevertheless frustrate adequate judicial protection of some of their claims. For example, bilingual education cases typify the circumstances in which the unavailability of direct evidence of intent blocks access to more stringent review.[70] Laws requiring English to be the sole language of instruction often have been on the books for a number of years; reenactment of such legislation may be routine, and in any event, large numbers of individuals may be involved in the legislative process.[71] Direct evidence of intent consequently is either unavailable or unreliable.[72] Moreover, discrimination against linguistic minorities in the area of bilingual education may sometimes be of a subtle variety. For example, the enactment of statutes making English the sole language of instruction in the schools may sometimes have been predicated on stereotypical views of linguistic minorities associated with assimilationism or Americanization.[73] Under these cir-

70. In addition to the theoretical reasons, there are practical reasons for examining the claims of linguistic minorities to bilingual education. A substantial number of people in the United States have difficulty speaking, reading, writing, and understanding English. *Cf.* Grubb, *supra* note 41, at 53 (over 5,000,000 school-age children are from non-English-speaking homes, but only 112,000 (2.2%) are in bilingual education programs). There is also strong evidence that non-English-speaking students have significantly higher dropout rates and lower achievement levels than English-speaking students when instruction is exclusively in English. 1 T. ANDERSSON & M. BOYER, BILINGUAL SCHOOLING IN THE UNITED STATES 43 (1970); T. CARTER, *supra* note 45, at 16-32; BILINGUAL BICULTURAL EDUCATION, *supra* note 45, at 14-19; *cf.* U.S. COMM'N ON CIVIL RIGHTS, MEXICAN AMERICAN EDUCATIONAL SERIES, REPORT II: THE UNFINISHED EDUCATION 8-38 (1971) (significantly higher dropout rates and lower achievement for Mexican-American students in five Southwestern states).

71. *See* Leibowitz, *supra* note 39, at 41-43 (describing enactment of statutes that require English to be exclusive language of instruction).

72. *See* note 55 *supra* (describing situations in which direct evidence of intent is unlikely to be available).

73. One observer has suggested that some statements of assimilative motivation should be taken as probative evidence of discriminatory intent. Comment, *Cultural Pluralism*, 13 HARV. C.R.-C.L. L. REV. 133, 162 (1978). The author argues that in certain contexts, such as a heated battle over integration in which an official refuses to provide bicultural education out of assimilative motivation, his remarks may constitute a statement of intent. *Id. See generally* Leibowitz, *supra* note 39, at 41-43 (statutes requiring English to be exclusive language of instruction in schools were passed during period of nativism).

Evidence of widespread discrimination may also help establish the social meaning of a legislative act. *See* Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424-27 (1960) (stigmatic effect of segregation in Southern subculture premised on white supremacy). If social context were deemed relevant, a considerable body of evidence showing generalized discrimination against linguistic minorities would be available. *See* JUSTICE IN THE SOUTHWEST, *supra* note 45, at 66-74 (documenting discrimination against Spanish-speaking persons in police contacts and court proceedings); U.S. COMM'N ON

cumstances, the claims of linguistic minorities, even if raised as those of quasi-suspect classes, would be unnecessarily foreclosed from an intermediate level of review under the current approach.

III. A New Model of Disproportionate Impact Analysis and Its Application to Bilingual Education

A new model of disproportionate impact analysis is necessary to afford adequate protection to the interests of quasi-suspect classes. Under such a model, a member of a quasi-suspect class would be able to establish discriminatory intent even when direct evidence of intent was unavailable. Safeguards would be necessary, however, to prevent the virtual elimination of the intent requirement. Under such a model, some linguistic minorities could establish an equal protection right to bilingual education.

A. *The Model*

This Note proposes that once members of a quasi-suspect class claim and prove a disproportionate impact, they should be able to establish a prima facie equal protection violation by adducing only circumstantial evidence of intent. Such circumstantial evidence could include the disproportionate impact itself, but courts should not regard proof of that impact as a sufficient showing; permitting evidence of disproportionate impact alone to establish intent would vitiate the intent requirement.

A claimant could meet this burden by introducing evidence that the impact was severe and that it persisted uniformly over a period of time.[74] Evidence of a pattern of facially neutral acts that foreseeably resulted in a discriminatory impact could also provide circumstantial evidence of intent.[75] The consistency, severity, and foreseeability of the impact would all increase the likelihood that the legislature in fact recognized and intended it. Once the plaintiff made a prima facie showing of discriminatory intent, the burden would

CIVIL RIGHTS, THE STATE OF CIVIL RIGHTS: 1979, at 33 (1980) (discrimination against linguistic minorities in voting); Leibowitz, *supra* note 39, at 25-41 (documenting historical discrimination against non-English-speaking in voting, regulation of business activities, and legal proceedings).

74. Note, *supra* note 55, at 797-99. Although the proposed test would require only circumstantial evidence of intent, the plaintiffs could introduce whatever direct evidence was available to strengthen their case. Direct evidence of intent includes public statements, minutes of meetings, facially discriminatory actions or legislation, and actual testimony. *Id.* at 797.

75. *Id.*

shift to the defendant to demonstrate either that it acted without discriminatory intent or that the law bore a fair and substantial relation to an important purpose.[76]

Adopting a purely circumstantial test of intent in this context would not covertly eliminate the intent requirement. First, evidence of intent in addition to the disproportionate impact itself would be required. The plaintiffs would have to prove that the relevant governmental body took action that perpetuated a disproportionate impact despite a recognition that the impact was significant and had persisted for a considerable period of time. More important, the defendant would have a realistic opportunity to rebut the prima facie showing. Even if the state could not establish the absence of discriminatory intent directly, an intermediate level of review would provide it with an opportunity to rebut the showing of intent by demonstrating that the law was well-designed to serve other ends.[77]

76. *See, e.g.*, Personnel Adm'r v. Feeney, 442 U.S. 256, 275 (1979) (fact that disproportionate impact not plausibly explained on neutral grounds under intermediate level of review signals that real classification made by law was not neutral). Under the Court's decision in Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), the defendant may show that discriminatory purpose was not a but-for cause of the decision rather than showing an absence of discriminatory intent. *Id.* at 270 n.21. If the plaintiff in *Arlington Heights* had met the high standard of proof established by the Court and had shown discriminatory intent, the defendant probably would not have been able to rebut this evidence by showing an absence of discriminatory intent. The defendant also generally would be unable to satisfy the demanding test of strict scrutiny. The Court may therefore have used the concept of but-for causation to provide the defendant with a realistic opportunity to rebut the plaintiff's prima facie case. Arguably, the Court is attempting to strike a balance between the need for heightened judicial review and the need to avoid the disutility and futility associated with the invalidation of laws that would have been passed absent any discriminatory purpose. Comment, *Proof of Racially Discriminatory Purpose Under the Equal Protection Clause:* Washington v. Davis, Arlington Heights, Mt. Healthy, *and* Williamsburgh, 12 HARV. C.R.-C.L. L. REV. 725, 752 (1977). Neither strict scrutiny nor rational relation review can strike an appropriate balance; the Court therefore resorted to the device of examining whether the discriminatory purpose was "strictly harmless" because the same decision would have resulted in its absence. *Id.* Because the proposed model applies only an intermediate level of review and because the plaintiff's burden of proof is lower, there is no need to resort to this but-for causation device to allow the defendant to rebut the showing of discriminatory intent. The proposed model therefore does not utilize such a concept.

77. *See* Perry, *supra* note 56, at 559-60. Professor Simon has suggested that this opportunity to rebut may support an intent requirement. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1121-22, 1127 (1978). According to Simon, proof of a disproportionate impact coupled with evidence that the action's claimed goal could reasonably have been promoted by means producing less disadvantage to the plaintiff class should support an inference of discriminatory intent. *Id.* at 1121. The government may rebut this showing by demonstrating the unreliability of the plaintiff's data, or the significant goal frustration or added costs that the alleged alternative would entail. *Id.* at 1127. Professor Perry has criticized this view and argued that the basic function of heightened review is to assure that laws with such costs are justified by sufficiently weighty considerations, whether or not they are motivated by racial prejudice. Perry,

Although the burden of proof on the intent issue thus would be shifted in part to the state, intent would remain a significant component of equal protection violations.

B. *Bilingual Education: A Possible Application*

Under the proposed model, plaintiffs could successfully establish an equal protection right to bilingual education in certain circumstances. They might first show that at the time of enactment or reenactment of statutes requiring English to be the sole language of instruction, statistical evidence indicated high dropout rates and low achievement for non-English-speaking children in schools in which English was the only language used.[78] They might also demonstrate

A Brief Comment on Motivation and Impact, 15 SAN DIEGO L. REV. 1173, 1182-83 (1978). Significantly, Simon would hold that a disproportionate impact resulting from the state's failure to inquire into the availability of reasonable alternatives, especially when a government agency must continually assess goals, means, and demographic data, constitutes a prima facie violation of equal protection. Simon, *supra,* at 1125. The proposed model, however, does not base violations of equal protection on disproportionate impact alone because it retains an intent requirement in evaluating original enactment and subsequent reenactments of challenged legislation.

78. Widespread concern about evidence of the adverse consequences of failing to provide bilingual education to linguistic minorities was voiced from the mid-1960s to early 1970s. *See, e.g., Bilingual Education: Hearings on S. 428 Before the Special Subcomm. on Bilingual Education of the Senate Comm. on Labor and Public Welfare,* 90th Cong., 1st Sess. 51-55 (1967) (statement of A. Bruce Gaarder). The federal government made specific provisions for bilingual education as early as 1968. Bilingual Education Act of 1968, Pub. L. No. 90-247, §§ 701-706, 81 Stat. 816 (current version at 20 U.S.C. §§ 3221-3223 (Supp. III 1979)). Despite this concern and the evidence supporting it, eleven states in the 1960s and 1970s reenacted, recodified, or retained after amendment of another portion of the statute, provisions making English the exclusive language of instruction. *See* COLO. REV. STAT. § 123-21-3 (1963) (current version at COLO. REV. STAT. § 22-1-103 (1973)) (recodified and reenacted 1963); 1963 Idaho Sess. Laws 116 (current version at IDAHO CODE § 33-1601 (Supp. 1980)) (enacted); 1961 Ill. Laws 31 (codified at ILL. ANN. STAT. ch. 122, § 27-2 (Smith-Hurd 1961)) (reenacted); 1974 Iowa Acts 531 (current version at IOWA CODE ANN. § 280.4 (West Supp. 1980-1981)) (enacted); 1965 Mass. Acts 340, 1967 Mass. Acts 778 (current version at MASS. GEN. LAWS ANN. ch. 76, § 1 (West 1978)) (amended); 1961 Minn. Laws 1018, 1967 Minn. Laws 162, 1969 Minn. Laws 262, 1974 Minn. Laws 544, 1975 Minn. Laws 462 (current version at MINN. STAT. ANN. § 120.10 (West Supp. 1980)) (amended); 1969 N.C. Sess. Laws 404, 1971 N.C. Sess. Laws 284, 1975 N.C. Sess. Laws 42 (codified at N.C. GEN. STAT. § 115-198 (1978)) (reenacted and amended); OR. REV. STAT. § 336.078 (1967-1968) (recodified 1968) (repealed 1971); 1961 Pa. Laws 841 (current version at PA. STAT. ANN. tit. 24, § 13-1327 (Purdon Supp. 1980-1981)) (amended); 1971 S.D. Sess. Laws 120, 1975 S.D. Sess. Laws 213 (codified at S.D. COMP. LAWS ANN. § 13-33-11 (1975)) (amended); 1963 Wis. Laws 41, 1963 Wis. Laws 566 (codified at WIS. STAT. § 40.46 (West 1966)) (amended). If, in spite of the generally recognized need for bilingual education, these legislatures reenacted such statutes, the plaintiffs could argue that these actions demonstrate a discriminatory intent. *See* pp. 930-31 *infra* (bilingual education claims meet *Feeney* test of intent).

Nine of the states mentioned have since made explicit provisions for bilingual education. 1975 Colo. Sess. Laws 666 (current version at COLO. REV. STAT. §§ 22-24-101 to -119 (Supp. 1980)); 1980 Idaho Sess. Laws 305 (codified at IDAHO CODE § 33-1601 (Supp. 1980)); 1973 Ill. Laws 2184 (current version at ILL. ANN. STAT. ch. 122, §§ 14C-1 to -12 (Smith-

that there was empirical evidence that bilingual education had positive effects for such children.[79] The high dropout rates would indicate that any assimilative purpose of the legislation was not being served. The data on achievement and the evidence on the positive effects of bilingual education would also show that such an approach did not promote equal educational opportunity.[80] Based on this evidence, the court then could reasonably conclude, prima facie, that

Hurd Supp. 1980-1981)); 1979 Iowa Acts 87 (codified at IOWA CODE ANN. § 280.4 (West Supp. 1980-1981)); 1971 Mass. Acts 296, 1971 Mass. Acts 943 (current version at MASS. GEN. LAWS ANN. ch. 76, § 1, ch. 71A, §§ 1-9 (West 1978 & Supp. 1981)); 1977 Minn. Laws 594, 1980 Minn. Laws 1339 (current version at MINN. STAT. ANN. §§ 120.10, 126.36, .261-.269 (West Supp. 1981)); 1971 Or. Laws 487 (codified at OR. REV. STAT. §§ 336.074, .079 (1979-1980)); 1968 Pa. Laws 1020 (current version at PA. STAT. ANN. tit. 24, § 15-1511 (Purdon Supp. 1980-1981)); 1975 Wis. Laws 1256 (current version at WIS. STAT. ANN. §§ 115.95-.996, 118.01 (West Supp. 1980-1981)). In two states, however, the laws remain on the books; these could be challenged under the proposed model. Even if states have since voluntarily enacted statutes permitting bilingual education, the analysis in this Note remains important because it would render the provision of bilingual education mandatory and might also require a demonstration that the bilingual programs were successful in achieving at least minimal proficiency in English.

79. *See* note 8 *supra*.

80. This view underlies passage of the Bilingual Education Act of 1978, Pub. L. No. 95-561, §§ 701-751, 92 Stat. 2268 (codified at 20 U.S.C. §§ 3222-3261 (Supp. III 1979)), which specifically states that bilingual programs are necessary to ensure an equal educational opportunity. *Id.* § 702 (codified at 20 U.S.C. § 3222(a)). Courts on numerous occasions have found that failure to provide bilingual education has deprived non-English-speaking children of an equal educational opportunity. Lau v. Nichols, 414 U.S. 563, 566-68 (1974); Serna v. Portales Mun. Schools, 499 F.2d 1147, 1149-50, 1153 (10th Cir. 1974), *aff'g* 351 F. Supp. 1279 (D.N.M. 1972). One court, however, has rejected a claim based on such data because it felt that the variations were due to differences in socioeconomic status rather than the failure to provide bilingual education. Otero v. Mesa County Valley School Dist. No. 51, 408 F. Supp. 162, 165 (D. Colo. 1975), *vacated on other grounds*, 568 F.2d 1312 (10th Cir. 1977). The court also noted in dictum that there is no constitutional right to bilingual-bicultural education. *Id.* at 170. Because the court held that the school district had already taken all necessary steps to remedy the language deficiencies of non-English-speaking students, *id.* at 176, the case does not rule out the possibility of an equal protection right to some minimum level of bilingual education.

A federal district court recently found that Texas' failure to provide bilingual education to Mexican-American students violated the equal protection clause. United States v. Texas, 506 F. Supp. 405 (E.D. Tex. 1981). The court pointed to three distinct forms of deliberate past discrimination against Mexican-American children. First, they had been restricted on the basis of ancestry to so-called "Mexican schools." Second, they were provided with vastly inferior educational resources. Third, in an effort to "Americanize" these Mexican-American children, their native language and culture were assailed and excluded. *Id.* at 414. The court concluded that "in the context of this concerted program of discrimination . . . , the policy of using English exclusively in the Texas public schools must be seen, not as neutral or benign, but rather as one more vehicle to maintain these children in an inferior position." *Id.* The systematic nature of the violation, moreover, constituted proof that the current language-based learning problems of Mexican-American children were caused in part by the state's prior unlawful actions. *Id.* at 416. The court further noted that "bilingual instruction [with the exception of ESL programs found to be inadequate] is uniquely suited . . . for compensating . . . for learning difficulties engendered by pervasive discrimination." *Id.* at 420. This approach is somewhat similar to the proposal advocated here, although the Texas case addressed the claims of a suspect rather than a quasi-suspect class.

the legislators had acted with discriminatory intent.[81] If the statutes furthered no articulated legislative purpose,[82] the state would be hard-pressed to rebut the plaintiff's showing. In the absence of such a rebuttal by the state, the plaintiffs would succeed in asserting an equal protection right to bilingual education.[83]

Conclusion

A new model of disproportionate impact analysis should be adopted for addressing the claims of quasi-suspect classes. The proposed model would adequately protect traditionally disadvantaged groups without leading to excessive disruption of governmental programs, accusations that the judiciary has exceeded its authority, or unduly heightened awareness of quasi-suspect classes. The utility of the proposed model is illustrated by the likelihood that it would increase judicial sensitivity to the possible right of linguistic minorities to bilingual education.

81. The situation described in the text could therefore easily meet even the new definition of intent in Personnel Adm'r v. Feeney, 442 U.S. 256 (1979). *See* pp. 924-25 *supra* (using definition of intent framed largely in terms of animus for claim by quasi-suspect class). In *Feeney*, the Court held that the state had a legitimate interest in extending preferences to veterans, both male and female. To accomplish this articulated goal, the legislature was required to pass a statute that had a disproportionate impact on women. Because there was no other way to achieve a legitimate legislative purpose, the statute was passed in spite of this impact rather than because of it. *But see* Note, *supra* note 68, at 1409-11 (if Court in *Feeney* had balanced disproportionate impact of law against legitimate interests it served, it might have found that legislature acted with discriminatory purpose). By contrast, a legislature could not argue that despite the disproportionate impact, its failure to provide bilingual education was necessary to promote the mastery of English because a large body of evidence refutes this proposition.

82. The only remaining legislative justification is the administrative convenience of teaching only in English. The courts, however, have often rejected administrative convenience as a justification for laws that perpetuate archaic stereotypes. *See* Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973) (plurality opinion); Reed v. Reed, 404 U.S. 71, 76-77 (1971). If administrative convenience is insufficient to justify an unthinking reliance on outmoded sexual stereotypes, it certainly cannot justify the intentional use of classifications to perpetuate such stereotypes.

83. Even if the proposed model did on occasion require providing assistance to a small number of non-English-speaking students, there is evidence that such a result would be workable. Although the HEW Task Force specified that Title VI would apply only to school districts with twenty or more students who spoke a primary language other than English, it explicitly recognized the school district's obligation to serve any student whose primary language was other than English. HEW Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under *Lau v. Nichols* 4 (Aug. 11, 1975), *reprinted in* CENTER FOR LAW AND EDUCATION, BILINGUAL-BICULTURAL EDUCATION 228 (1975). The limited application of Title VI was necessary only during the initial stage of investigation due to limited staff. *Id.* After this initial stage, HEW presumably would recognize a broader obligation to non-English-speaking students. *Id.* These findings answer the concern voiced by several courts, *see, e.g.*, Otero v. Mesa County Valley Dist. No. 51, 408 F. Supp. 162, 169 (D. Colo. 1975), *vacated on other grounds*, 568 F.2d 1312 (10th Cir. 1977); Morales v. Shannon, 366 F. Supp. 813, 822 (W.D. Tex. 1973), *aff'd in part and rev'd in part*, 516 F.2d 411 (5th Cir. 1975), that an equal protection right to bilingual education would result in administrative chaos.